BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JUDY GEORGIE	)	
Claimant	)	
VS.	)	
	)	Docket No. 239,317
COLONIAL MANOR	)	
Respondent	)	
AND	)	
	)	
INSURANCE COMPANY ST. OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

The claimant appeals the Award of Administrative Law Judge Brad E. Avery dated October 6, 2000. The Board heard oral argument on March 13, 2001.

APPEARANCES

Claimant appeared by her attorney, Roger D. Fincher. The respondent and its insurance carrier appeared by their attorney, Stephen P. Doherty. There were no other appearances.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant a 13 percent permanent partial general disability based upon functional impairment.

On review, claimant contends the ALJ erred by finding claimant could earn 90 percent or more of her average gross weekly wage that she was earning at the time of her injury and limiting her compensation to a functional impairment. Claimant contends that she is entitled to a work disability based upon diminished wage and task loss.

Conversely, respondent contends that the ALJ's Award should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board finds that the Award entered by the ALJ should be affirmed.

Claimant was hired by respondent in 1996 as a certified medication aide (CMA) although claimant testified that she was also required to perform the duties of a certified nurse's aide (CNA). Claimant injured her low back at work on April 10, 1998 while moving a patient. The parties stipulated that claimant's gross average weekly wage was $378.61.

Claimant testified that when she returned to work after her injury, respondent failed to adhere to her light duty restrictions. As a result, claimant was placed back on temporary total disability. Thereafter, when claimant reached maximum medical improvement and was given permanent restrictions and released by Dr. MacMillan, respondent was unable or unwilling to accommodate those restrictions.

Claimant found work at Presbyterian Manor as a CMA earning $10.25 per hour. But the work caused her continued problems and although full-time work was available, claimant limited her work to about 30 hours a week.[1]

Claimant testified that the work did not exceed her restrictions but, if she attempted to work more hours she would experience increased pain. Claimant ultimately was terminated from this job due to attendance problems which she attributed to illness and foot problems unrelated to this claim.

After claimant was terminated from her employment with Presbyterian Manor, she next found work at Community Living Opportunities (CLO) as a CMA. Claimant worked 20 to 25 hours a week and was paid $10.00 an hour. Claimant acknowledged that if she could work just as a CMA she could handle working more than 25 hours a week, but additional hours were not available at CLO. Claimant did not apply for full time employment elsewhere, however, while she was employed part time at CLO. She voluntarily left that job because she could not afford to keep her apartment on what she was earning. Therefore, she moved to Wichita to live with her brother.

Following her move to Wichita, claimant testified that she looked for work. Her job search, however, consisted of only making inquiry at one nursing home and some fast food restaurants.

---

[1] Claimant testified during her direct examination at Regular Hearing that she worked 20 to 25 hours per week at Presbyterian Manor. On cross examination she was confronted with her earlier testimony at deposition that she worked there 30 to 40 hours per week. When asked which testimony was accurate, claimant answered 30 hours per week.

The dispositive issue is whether the claimant has met her burden of proof to establish entitlement to a work disability.

K.S.A. 1997 Supp. 44-510e(a) provides in pertinent part:

> An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

An injured employee is barred from a work disability under K.S.A. 44-510e(a) if he or she is earning 90 percent or more of the employee's pre-injury wage. It is well settled that an injured employee must make a good faith effort to return to work within their capabilities in order to be entitled to work disability under K.S.A. 44-510e(a). Oliver v. The Boeing Company-Wichita, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* ___ Kan. ___ (1999). If an injured employee fails to make a good faith effort to find appropriate employment, a wage may be imputed based upon the employee's capacity to earn wages. Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). Therefore, before determining if the employee is still capable of earning nearly the same wage, the fact finder must first determine if the employee made a good faith effort to find appropriate employment. Parsons v. Seaboard Farms, Inc., 27 Kan. App.2d 843, 9 P.3d 591 (2000).

In this case, claimant admits that no physician recommended restrictions limiting the number of hours per week that claimant should work. But, the question of whether it was good faith for claimant to limit her work week to less than 40 hours is complicated by Dr. Bieri's testimony on the subject. He was posed the following questions and gave the following answers:

> Q. . . . I would like to propose to you a hypothetical question. I'm going to ask you to assume the following facts are true and are premised on the claimant's testimony during the hearing. Assume she'll testify at the hearing that since the time of the report she's returned to work and she's currently working approximately 25 hours per week. She's also going to testify that when she works more than 25 hours per week that that type of situation causes too much strain on her condition, hurts her back and is causing her problems. My question to you is in light of your examination and your findings, would, would that be a consistent statement for the claimant to make?
>
> . . .
>
> A. I believe so.

> Q. Okay. Would that be a consistent type of limitation for her to put on herself if she was having problems after working 25 hours?
>
> A. One way to consider restrictions would be on a time basis, which in the Dictionary of Occupational titles does subscribe to, in which a 40-hour work week is considered unrestricted by definition. If one applied varying levels to it, that – 25 hours a week would be consistent with the light to medium physical demand level, I believe so.
>
> Q. So would you feel comfortable saying that's a reasonable restriction under that hypothetical?
>
> A. Can be.[2]

Nevertheless, it was claimant's testimony that she could work 40 hours per week as a CMA. But instead of seeking full time employment as a CMA that would have paid a wage more than 90 percent of her pre-injury wage, claimant made the decision to go to work part time for CLO and not to continue seeking full time work while employed there. Accordingly, it was claimant's voluntary choice to become underemployed. Furthermore, after relocating to Wichita, claimant's job search efforts were less than what would be reasonably expected to establish good faith. The Board finds, therefore, that she failed to make a good faith effort to find appropriate employment post-injury. Consequently, her actual wage will not be used to determine wage loss. Instead, a wage will be imputed based upon her capacity to earn wages. Herein, claimant had clearly demonstrated that she could earn a wage with another employer which, if she worked 40 hours a week, would exceed 90 percent of her pre-injury wage. As a result, her compensation is limited to her functional impairment in accordance with the statute.

The sole testimony regarding claimant's functional impairment was provided by Dr. Peter V. Bieri. Dr. Bieri opined that as a result of claimant's injuries to her lumbar spine, as well as her range of motion deficits and weakness, claimant has a 13 percent functional impairment to the body as a whole. The ALJ's finding that claimant is entitled to an award for a 13 percent permanent partial general disability is affirmed.

AWARD

WHEREFORE, it is the finding of the Workers Compensation Board that the Award of Administrative Law Judge Brad E. Avery dated October 6, 2000, should be affirmed in all respects.

IT IS SO ORDERED.

---

[2] Deposition of Peter V. Bieri, M.D., at 14-15.

Dated this ____ day of March 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Topeka, KS
Stephen P. Doherty, Kansas City, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director